FILED
AUG 22 1955
HAROLD B. WILLEY, C

No. 340

IN THE

SUPREME COURT

OF THE

United States

October Term 1955

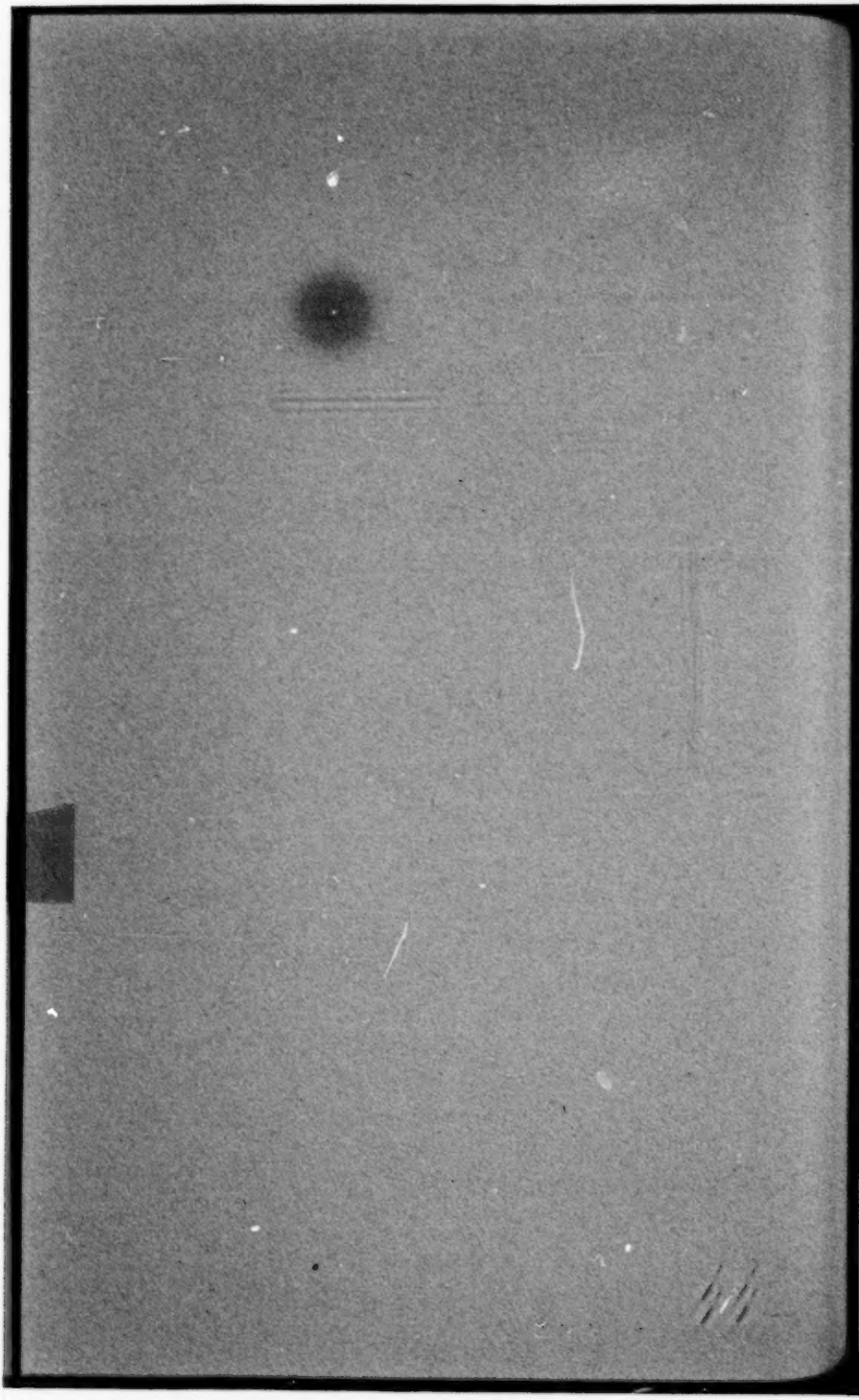
HAMLIN K. BUCHMAN,
Petitioner,

vs.

CLAIRE MORSE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
Attorney at-Law
620 Bartlett Building
215 West Seventh St.
Los Angeles, California
TRinity 3241
Attorney for Petitioner.



TOPICAL INDEX

	Page
Jurisdiction	1
Opinions Below	2
Constitutional Provision Involved	2
Statement	2
Questions Presented	7
Reasons for Granting the Writ	8
Appendix A	App. 1
Appendix B	App. 27

TABLE OF CASES AND AUTHORITIES CITED

Cases

132 A. C. A. 92	2, 5
Adler v. U. S., 182 F. 464	10
Amrine v. Tines, 131 F. (2) 827	10
Baker v. U. S., 156 F. (2d) 386, 388	9
123 C. A. (2) 546; 267 Pac. (2) 73	2, 4, 5
Floyd v. State, 148 So. 226, 232	9
Glasser v. U. S., 315 U. S. 60; 86 L. Ed. 680	8-9
Gomilla v. U. S., 146 F. (2) 372	10
Hunter v. U. S., 62 F. (2) 217, 220	10
Offutt v. U. S., 99 L. Ed. (Adv.) 7	12
Patton v. U. S., 281 U. S. 276, 312	9
People v. Creasy, 140 N. E. 563; 236 N. Y. 205	10
People v. Ephraim, 77 Cal. App. 29	9
Quercia v. U. S., 289 U. S. 466	9
State v. Hudson, 215 S. W. (2) 441, 442, 358 Mo. 424	10

1, 1955, rehearing by the Supreme Court of California, hearing denied June 25, 1955. (132 A. C. A. 92). The petition for certiorari is being filed within 90 days thereafter.

OPINIONS BELOW

123 C. A. (2) 546; 267 Pac. (2) 73.
132 A. C. A. 92.
Appendix A and B herein.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U. S. Constitution of the United States, "nor shall any State deprive any person of life, liberty or property, without due process of law."

Section 1000, California Probate Code.

STATEMENT

Your petitioner, a former assistant States attorney in Illinois, was named as testamentary executor in his brother's last will and testament. By the latter document he was left three-quarters of the estate and Claire Buchman (Morse) was left a quarter. However, a month before he died he entered into a property settlement agreement with her in anticipation of a Nevada divorce by her. (R. 44.) They had been married a little more than a year. By the terms of this property settlement each party immediately transferred or quit-

claimed to the other all their respective properties. She received and took immediately under the settlement agreement a Cadillac car, household furniture, money in the bank, jewelry, cash, and a deposit of $25,000 in escrow, of which $2,500.00 was withdrawn to pay her attorney in connection with the contemplated divorce. The agreement provided that its effective date would be upon its approval in a divorce court. (R. 58).

Following the death of petitioner's brother Claire Buchman (Morse)—she became "Morse" within 60 days after his death—sought a quarter of the estate, in lieu of the property given to her under the property settlement agreement. She filed a petition to remove petitioner as testamentary executor, and sought partial distribution of the estate under California probate, Section 1000. Under California law the determination of her right to partial distribution would determine her right to take under the will rather than her executed and property settlement, which had been carried out with the exception of the actual distribution of $22,500 escrowed with her attorney and the attorney for petitioner, Jerry Giesler and Isaac Pacht and the securing of a divorce. (R. 290).

Her petition to remove the executor, your petitioner herein and for partial distribution and other matters came on for hearing March 11, 1954 and March 13, 1954. It was stipulated that all matters would be heard together. (R. 89, 680). It was at that time that the trial judge expressed a personal interest in the case and at least ten times asked petitioner to resign

as executor. He refused and was summarily removed by the judge. (R. 168). In a vigorous opinion the District Court of Appeal, Division 3, of the State of California, held he was denied due process of law guaranteed by the Fourteenth Amendment, U. S. Constitution. (123 C. A. (2) 546) (see appendix herein). This became the law of the case.

The trial judge after summarily and arbitrarily removing petitioner as executor, in violation of due process of law, proposed to hear and determine all other issues. To get the case transferred from his court and hearing petitioner filed a petition to determine heirship, and made a demand for trial by jury. (R. 614). He also filed an affidavit of bias and prejudice against this trial judge. (R. 553). The judge controverted the affidavit, and another judge of the same court ruled he was not biased and prejudiced—based solely on the affidavit. California has no procedure which permits a challenge to the fairness or lack of bias or prejudice of the judge, except on affidavits. (R. 584). There is no appeal from the order of another judge of the same court finding him not biased or prejudiced.

The order of removal of an executor is an appealable order under California law. It was here that petitioner first had an opportunity on appeal to challenge the trial judge's conduct as violative of his right to due process guaranteed by the Fourteenth Amendment to the U. S. Constitution, and to a fair and unbiased judge. The District Court of Appeal, held with petitioner that he was denied due process. (123 C. A. (2) 546.)

But while the case was pending on appeal, this same judge, in a county where there were more than 75 other judges available, nevertheless, proceeded to hold the case to himself and to hear and try the remaining issues in the case. (R. 214). Many factual matters had to be considered and determined and many rulings were involved on the admission and exclusion of evidence. Petitioner's counsel was also faced with the trial of a case before a judge who had already expressed himself, (R. 115, 116, 118, 141, 147, 150, 157, 159,—535) not merely in words, but by conduct, as being biased and prejudiced against petitioner, and such a situation, created a difficult, if not impossible barrier to a fair trial guaranteed by the Fourteenth Amendment, U. S. Constitution. The trial judge, thus, over objections, continued to try the other issues involved, including the issue of partial distribution which by his ruling gave the wife a quarter of the estate consisting of two apartment houses in Los Angeles grossly appraised as instead of the money and property already received under the property settlement.

Your petitioner raised the denied of due process guaranteed by the Fourteenth Amendment, U. S. Constitution in the District Court of Appeals, Second Appellate District, Division 3, which sustained his position (123 Cal. App. (2) 546) and in answer to a petition for hearing in the same matter before the Supreme Court. He also raised the due process question under the Fourteenth Amendment, U. S. Constitution, on appeal from the second portion of the proceedings (132 A.C.A.

106) which was denied by the District Court of Appeals, Second Appellate District, Division 2. a petition for hearing before the California Supreme Court he renewed his challenge, under the Fourteenth Amendment to the Constitution of the United States, which challenge was denied by that court, one justice dissenting.

The trial judge in the proceedings which followed thereafter ruled adversely to petitioner, on many issues of fact and law. He denied at the first hearing the right of petitioner to substitute counsel of his choice. Although present counsel was thereafter substituted into the case he was thereafter faced with the barrier of the trial judge's unwillingness to have him substituted into the case. This trial judge considered issues not made by any pleadings, failed to find on the issue of estoppel of the wife by reason of her having accepted and not returned or offered to return more than $40,000 worth of property, and decreed that the wife should take under the will and not the executed and mostly carried out property settlement agreement.

After the trial judge's adverse rulings to petitioner and his decree of partial distribution, the District Court of Appeals, Division 3, reversed the trial judge's order of removal,[1] held it was without due process, the Supreme Court denied hearing, and he has ever since been the executor of the estate, duly acting in that capacity. The denial of due process to him and his

[1]In California the removal of an executor is an appealable order, while the appeal was pending the trial judge went ahead with the trial of the remaining issues.

arbitrary removal by the trial judge, at the outset and the trial judge's evident interest in the case by his persistent efforts to persuade petitioner to resign as executor, fatally infected the rest of the trial.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when he was forced to proceed to trial before a judge who had already denied him due process of law at the very outset of the proceedings.

2. Whether a judge who evinces such an interest in probate proceedings as to try ten times to get petitioner to resign as testamentary executor of his brother's last will shows such an interest in the case as to disyualify him as a disinterested judge and whether his continuing to try the case affecting petitioner's rights to inherit all the property rather than three-quarters denied petitioner due process of law guaranteed by the Fourteenth Amendment to the U. S. Constitution.

3. Whether such a judge, who denies even the right to substitute the attorney of one's choice into the case at the outset of the proceedings, is in such a state of mind as to petitioner as to deny him the effective aid of counsel.

REASONS FOR GRANTING THE WRIT

This case raises important constitutional questions, to-wit, the denial of due process of law and the fairness of a trial guaranteed by the Fourteenth Amendment to the U. S. Constitution. The questions were raised in the courts below. The Distrct Court of Appeals, Division 3, State of California, agreed that appellant was denied due process and the Supreme Court of California thereafter agreed. But another division of the California Appellate Court did not agree that this disqualified this same judge from hearing the rest of the matters still pending before this judge. The Supreme Court of California did not grant a hearing on this issue.

We submit that due process cannot be turned on and off like a water faucet. When the trial judge, by his conduct, acted as he did, evincing a deep interest in having petitioner resign, refusing to substitute counsel, then without notice, hearing or evidence, and refusing proferred evidence, arbitrarily removed petitioner, he should not have gone on with the rest of the trial. The California courts found the conduct of the trial judge without due process. But a different branch of the court did not find that such conduct disqualified the trial judge from hearing and determining the remaining issues. On the latter determination we seek the review of this court, and reversal of the judgment below.

Justice must not only be fair, but have all the appearance of fairness. *Glasser v. U. S.*, 315 U. S. 60;

86 L. Ed. 680). Here the proceeding lacked both. Due process of law was denied petitioner. Counsel of his choice, during the first phase of the proceedings was not even permitted to substitute into the case. (R. 156). A trial must be held in an atmosphere in which attorneys can assert the defendant's rights freely and fully.

Floyd v. State, 148 So. 226, 232.

Where an attorney must fight not only his opponent and the issues of the case, but also the expressed attitude of the judge toward his client due process is denied, and the effective aid of counsel is prevented.

Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680;
Quercia v. U. S., 289 U. S. 466;
Patton v. U. S., 281 U. S. 276, 312.

An impartial judge and a fair tribunal are of the very essence of due process of law.

State v. Leland, 227 P. (2) 785, 790;
The Reno, 61 F. (2) 966.
Universal Adjustment Corp. v. Midland Bk. Ltd. of London, Eng., 184 N. E. 152, 159.

The right to a fair trial by an unbiased and unprejudiced judge is one of the essentials of due process of law guaranteed by both the Fourteenth Amendment to the Constitution of the United States and the Constitution of California.

Baker v. U. S., 156 F. (2d) 386, 388;
People v. Ephraim, 77 Cal. App. 29;

People v. Creasy, 140 N. E. 563; 236 N. Y. 205;
Amrine v. Tines, 131 F. (2) 827;
Whitacre v. McLean, 118 F. (2d) 596;
State v. Hudson, 215 S. W. (2) 441, 442, 358 Mo. 424.

A trial by a judge who has acted arbitrarily and denied due process of law to a party is itself a denial of due process and nullifies the judgment.

Williams v. U. S. (9th Cir.), 93 F. (2) 685;
Hunter v. U. S., 62 F. (2) 217, 220;
Adler v. U. S., 182 F. 464;
Gomilla v. U. S., 146 F. (2) 372.

These are constitutional guarantees which must be preserved if our way of life is to be preserved and protected.

Due Process Clause, Fourteenth Amendment U. S. Constitution. (Similar holding under Fifth Amendment in Federal Court.)

There was before the court therefor, an appeal in a matter heard before a judge, whose mind was in such condition that it was difficult for him to act with impartiality in any matter in which appellant was concerned; his mind was not open to the arguments of counsel for appellant, but was supersensitive to the arguments of opposing counsel. He could see no ambiguity in a contract which contemplated that contracting parties should bring an action for divorce but which left it uncertain as to which was the injured party,

and therefor as to which one of them carried the certain or procuring such decree. Although, as we have seen heretofore, a definite affirmative defense was made in the answer of appellant which requires findings of fact and which allegation, if they were found to be true and embodied in findings of fact would support the conclusion of law that the respondent was estopped from claiming under the will.

In short, the court failed to find upon material issues, treated the allegations of the respondent to be true and ignored competely the defense proposed by appellant and arrived at the conclusion that there was no estoppel by the simple process of ignoring the allegation upon which such estoppel was predicated. It is a case, in which the court having reached his own conclusion, without evidence, denied appellant the opportunity to produce material and relevant facts, including evidence which if received would have been ample to support the conclusion that it was the wife who was to bring the action for divorce and that if she had acted with diligence an interlocutory decree of divorce would have been had in this evidence befor the death of the decedent and that therefore the failure to procure such decree was due entirely to the fault of the wife. It is a case in which the trial judge was receptive to the view that the separate agreement, notwithstanding its language might become and would become effective by reason of the conduct of the parties with relation to it or to the other view and that the wife having accepted all of the benefits of an effec-

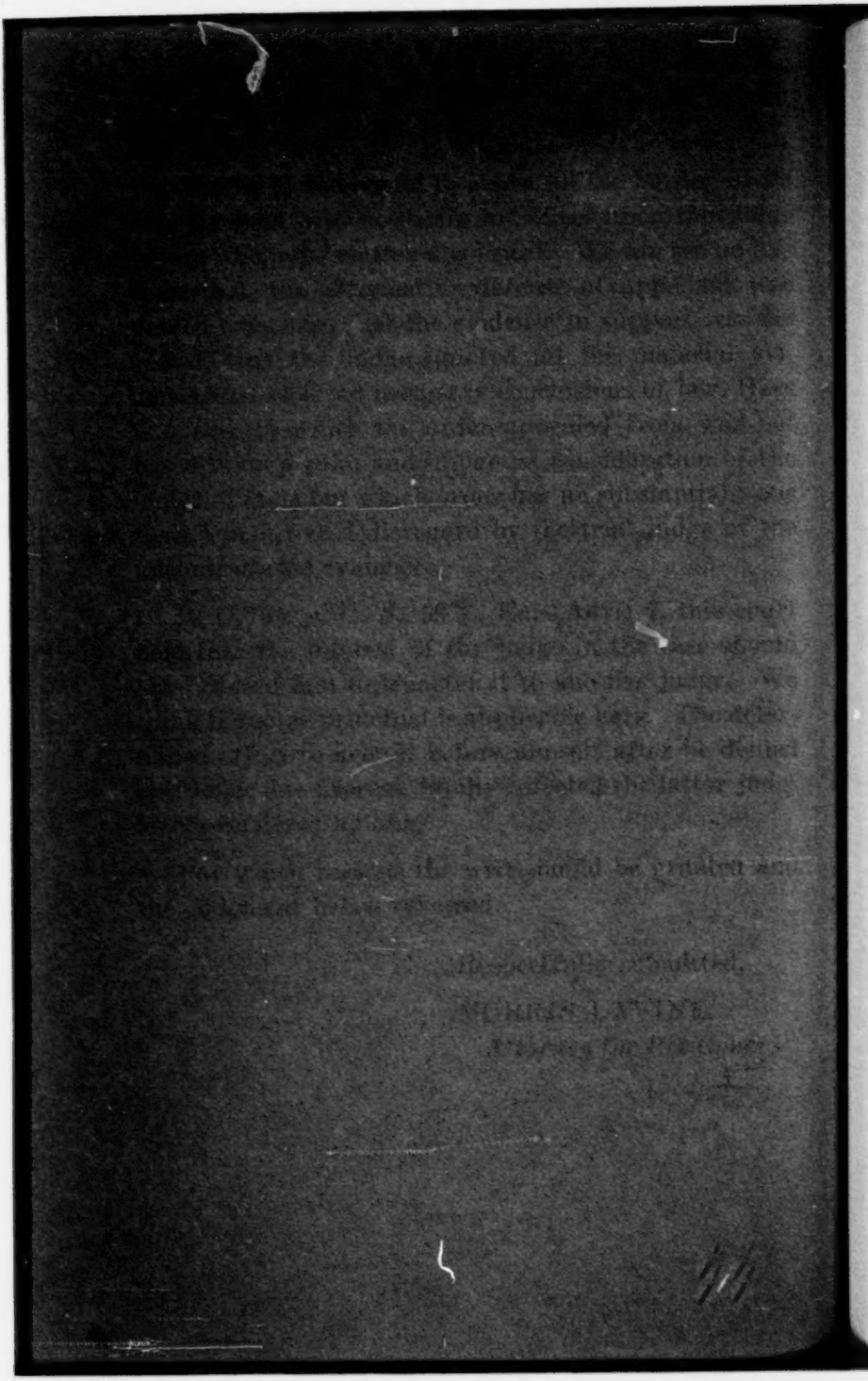
tive contract, was bound to assert all the burden of its effectiveness with no desire to reflect upon the judge before whom the matter was heard. We can see no less than that, the affirmative defense of appellant was denied existence, that the evidence in support was rejected, that the judge ignored all the material evidence, and rejected necessary conclusions of law. Here is a case in which the order appealed from was not based upon a calm and impartial consideration of the material facts but which order has no substantial basis than a manifested disregard by the trial judge of the uncontradicted evidence.

In *Offutt v. U. S.*, 99 L. Ed. (Adv.) 7, this court held that the interest of the judge in the case should have caused him to transfer it to another judge. We think the same principal is applicable here. The determined effort to keep it before himself after he denied petitioner due process, fatally infected the latter judgments rendered by him.

For which reasons the writ should be granted and the judgment below reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.



APPENDIX A

In re BUCHMAN.

MORSE vs. BUCHMAN.

Civ. 19775.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1954.

Proceeding by legatee to obtain revocation of letters testamentary and removal of executor. The Superior Court of Los Angeles County, Newcomb Condee, J., removed executor, and executor appealed. The District Court of Appeal, Vallee, J., held that, where executor was not given notice that he was to be removed on ground that he was allegedly so mentally deranged as to be incompetent to act as executor, was not accorded just, fair, and impartial hearing either upon charge that inventory had not been filed in time or upon ground of alleged incompetency, and was denied opportunity of presenting any evidence, executor was denied due process of law.

Reversed.

Morris Lavine, Los Angeles, for appellant.

Jerry Giesler, Beverly Hills, and George I. Devor, Los Angeles, for respondent.

VALLEE, Justice.

An appeal from an order of the probate court revoking letters testamentary and removing an executor.

Harry G. Buchman died testate on September 4, 1951. He named appellant Hamlin K. Buchman, his brother, executor of his will. The will left three-fourths of the estate to appellant, and one-fourth to Claire Buchman, his wife, from whom he was separated. The will was admitted to probate and an order made that letters testmentary issue to appellant on his giving a surety bond of $75,000 or a personal bond of $150,000. Letters testamentary issued to appellant on October 18, 1951. The inventory was filed May 12, 1952.

On January 26, 1953, Claire Morse, formerly Claire Buchman, filed a petition praying that a citation issue commanding appellant to show cause why, among other things, the letters testamentary issued to him should not be revoked and he should not be removed as executor. The petition averred, as one ground for appellant's removal, that he had not returned an inventory within three months after the date of his appointment. It did not allege that appellant was so mentally deranged as to be incompetent to act as executor.

On January 26, 1953, a citation issued commanding appellant to appear on February 13, 1953, and show cause why the letters testamentary should not be revoked and he should not be removed as executor. The citation was served on appellant's attorneys, but not on him personally as required by section 1207 of the Probate Code. However, he filed an answer to the

petition and citation in which he averred that Claire Morse is not a person interested in the estate because of a property settlement agreement she had entered into with decedent and facts showing reasonable cause why the inventory had not been filed within three months after his appointment, one fact being that the appraisal was not completed by the appraiser until May 12, 1952, on which date it was filed.

The matter came on for hearing on March 11, 1953. Appellant was present, represented by counsel. A conference was immediately had in the judge's chambers between the judge and counsel for the petitioner and for appellant. The conference was not reported. As will appear hereafter, the attorney for appellant evidently told the judge that appellant had been having some treatments for a nervous disorder. When the judge returned to the bench, considerable discussion took place between the court and counsel with respect to the other matters in the estate that were on the calendar that day. As the noon recess was about to be taken, the judge stated he had received some information under section 521 of the Probate Code which he could not ignore; that he felt it was his duty to investigate; and that on resuming the hearing in the afternoon, he would "go into some of these matters concerning the present status of the executor and any treatment that he is undergoing and so on."

On resumption of the hearing in the afternoon, appellant addressed the court stating he was not represented by counsel. Counsel for petitioner stated the

record showed that a firm of attorneys represented appellant. Appellant declared that in view of what had transpired that morning, he had asked his attorney, who attended the conference in the judge's chambers, how the court had found out that he (appellant) had been to a physician; and the attorney had said he had given that information to the judge. He stated that during the noon recess he had attempted to contact other attorneys, among them, Mr. Dee Holder. The judge interrupted, and said: "[D]o you think perhaps because of—in order to expedite the matter, would you like to resign and then your rights could be completely protected and we could go about it in that way? We could consider your suggestions as to a suitable corporate in any matter of this kind and anything of this kind could be avoided without any suggestion one way or the other, except that you feel a little nervous now." The following then occurred:

> "Mr. Buchman [appellant, the executor]: Your Honor, I feel a little bit nervous because I am taken by surprise. I feel a little bit nervous too because I appear in court not feeling that I am represented by counsel, which is the constitutional right of every citizen.
>
> "The Court: You don't feel that you want to resign at this time?
>
> "Mr. Buchman: No, your Honor. My brother, Harry G. Buchman, a man that I financed many years ago, had every confidence that I was capable of acting as executor and he so appointed me, not only in one will but in three or four wills. . . .

"The Court: I would suggest that the simplest way would be for you as executor to resign. Certainly you would be heard and I think you perhaps could be more effective in that position.

"Mr. Buchman: No, your Honor, I will not resign. I will not resign. I won't resign in the face of that accusation, which I think he has taken advantage of, any more than I would—

"The Court: What accusation?

"Mr. Buchman: Any more than—

"The Court: Just a moment. Which accusation is that you are talking about?

"Mr. Buchman: What about the information related to the court without my knowledge?

"The Court: There is no information related to the court except what is in the pleadings here. . . .

"Mr. Buchman: . . . Now, I won't resign on any facts of this nature at this time any more than I would resign on any embarrassment on the facts in 1941.

"The Court: Of course, I am suggesting that if you did want to resign, and there might be many reasons why you would want to resign, it would be without any implication whatsoever.

"Mr. Buchman: No, your Honor, I feel I should have a chance to have counsel represent me. . . .

"The Court: Well, I tell you there is a way out. You have an Achilles heel in that you didn't file an inventary within 90 days. That is within the discretion of the court to consider that the failure

of this obligation or duty would be a cause for removing you. I have had a chance to observe you here. I have had a chance to observe you here this morning in the corner. Oh, you may have a reason for it—

"Mr. Buchman: Well, I don't want my photograph taken, your Honor. I don't want my photograph taken. But I will submit to any test, your Honor, that is requested in a matter of this kind, skillful and competent examination, and I will submit myself to examination before distinguished people, distinguished physicians, your Honor."

Appellant then addressed the court at great length, following which the judge asked him whether he had consulted a neurologist recently, to which he replied that he would have no hesitancy about going into the judge's chambers. The judge then asked him if he would answer questions on the record if he went into chambers, to which he replied that he would. The judge and appellant then retired to the judge's chambers without the presence of counsel. A reporter was present. Appellant was not sworn. The judge asked him whether he had had a recent consultation with a neurologist. He said he had. The judge asked him who was his neurologist. Without answering the question, appellant made a long statement to the judge, some of it relating to the estate, most of it not. The judge again asked him if he did not want to resign. He said "No," that in the first place he wanted to be represented by counsel and he would be examined by any physician appointed by the court. The judge then said: "Of

course, it is not entirely a matter of medical testimony. I have the responsibility, if I think a person is emotionally incompetent to handle the matter I really have to get an executive that can." Appellant replied: "Emotionally—I am not emotional in the operation of my property."

The judge resumed the bench and Mr. Holder appeared. The judge told Mr. Holder, among other things, that the attorney for appellant had told him in chambers that morning that appellant "had been having some treatments for a nervous disorder"; that in open court he had asked appellant about "the neurological treatment," and he had said he preferred to talk in chambers; that in chambers appellant had "conceded" there had been treatments; that he suggested other reasons for it, did not care to give the name of the doctor, but would submit to any doctor the court might appoint; and "There is another technical cause set forth in the petition for removal with which you are acquainted, that is the failure to file inventory within 90 days, which has been a means by which the court if it wants to, can have a technical reason for removal, *that is rather difficult and almost impossible to meet.* [Italics added.] . . . I have contacted Dr. Edwin E. McNeil, M. D., who is a neurologist and a psychiatrist, and I have arranged an appointment at two o'clock tomorrow for Mr. Buchman to go there and consult with the doctor, and the doctor will render his written report to me." Appellant stated he would prefer not to have it in the hands of just one person. The judge asked Mr. Holder to advise appellant to wait

until Dr. McNeil's report was in. Mr. Holder stated that appellant could have examinations by other doctors which the judge would be willing to consider. The judge, in part, replied: "Oh, yes, if I am willing to prolong the hearing. I don't know. I [sic] would be within the court's control, but I certainly want to be fair." Mr. Holder then said he wanted to get his status clear; he understood appellant was then represented by counsel. The judge replied: "As executor or administrator. I think this goes to personal privilege. I think when you are being removed for causes . . . that it would be perfectly permissible for him to have special counsel on that matter alone." The judge gave appellant Dr. McNeil's address and telephone number, and told him he was to be there the next day, Thursday, March 12, at 2 p. m. Mr. Holder stated: "I understand the only matter your Honor will be considering is the mental responsibility of Mr. Buchman to continue to act as executor under the will; is that correct?" To which the judge replied, "Yes."

The hearing was resumed on March 13, 1953, at which time Mr. Morris Lavine appeared and stated that appellant had retained him the day before and that he had presented a substitution of attorneys to the attorney of record for appellant who was present. The judge stated that he could not consent to a substitution "when a conflicting estate matter, another matter is on trial"; that there had to be a motion, and that Mr. Lavine might "appear for him specially on this matter of personal privilege."

The judge then ascertained from the clerk that Dr. McNeil had not made an examination, and the following took place:

"The Court: Well, I was well satisfied that he was incompetent here. I have a record here, his rambling statements, his staring eyes, the emotional approach, and I was sorry, but in the performance of my duty I have to be sure that there are no executors or administrators who are not competent to carry out the office, but he asked to have an examination and I suggested that he have one.

"Mr. Lavine: He has had one.

"The Court: But if he is not capable of permitting the examination or cooperating in one it verifies my opinion that I had already formed. There was also a technical reason why I have a right to remove him, and I am now removing him as executor on those grounds: First, that he is incompetent; and, second, that he did not file his inventory within 90 days. The order is now made.

"Mr. Holder: Now, if your Honor please, may I make the observation first—

"The Court: But he is removed. Now, you can go on from there. I expect there will be an appeal.

"Mr. Lavine: Yes, your Honor, there will be an appeal.

"The Court: Well, I will appoint a special administrator to proceed, but it is my duty, I cannot do anything else, and that is why I am acting as I am. I do not have to go any further than that.

"Mr. Lavine: Well, your Honor, we have a doctor here this morning. He saw him yesterday. And we are also ready to make an offer of proof.

"The Court: You can make your offer of proof if you want. I was ready to make my decision and it was because of consideration for him that I let him go to that doctor. He did not cooperate with that doctor.

"Mr. Lavine: That is not true.

"The Court: It verified my opinion that he is probably not emotionally stable enough to handle it as executor.

"Mr. Lavine: How does it show, your Honor, he did not cooperate with that doctor? May I ask that question?

"The Court: You heard the oral report.

"Mr. Lavine: No, there has been no report. The doctor is not present and the facts of the matter are, your Honor, we are prepared to show that Mr. Buchman went to the office of Dr. McNeil and said, 'I will be glad to cooperate with you for an examination. I want a witness present. I want a stenographer present.'

The Court: You know very well that a psychiatric examination cannot be made with a third party present.

"Mr. Lavine: Another doctor made it and he is present.

"The Court: I know, you can get dozens of doctors, you can get testimony on either side. It is not disrespect to the doctors, but it is not the examination and the ultimate decision has to be made

by the court. But I must confess I was all ready [to] decide the matter the other day, but I extended to him the courtesy of allowing him an interview with a doctor who has no interest in any way and who knows none of the parties and in whom the court has confidence, particlarly because of two or three other matters he testified in. But I am not going to continue this. There is no necessity to continue it. The record is made and I will stand or fall by it, but I will not proceed without—

"Mr. Lavine: May I address the court and make my offer of proof? I still think that I have the right to make the offer of proof and make my record.

The Court: Yes, you may make your offer."

Mr. Lavine made the offer of proof set forth in the margin.[1] The judge agreed that the offer of proof be

[1]"Mr. Lavine: At this time the petitioner offers to prove that he kept the appointment at two o'clock with Dr. McNeil: that he went to the office of Dr. McNeil; that he stated to Dr. McNeil that he would be glad to have an examination, that he would be glad to cooperate with the doctor, answering any questions and have any examination made if he had a stenographer with him, so that his attorney might know what questions were asked and what foundation the doctor might have for any opinion that he might give; and that he felt that he should have the witness, that the judge himself had had a stenographer present when he had questioned the defendant—questioned Mr. Buchanan; and that at other times when the judge had gone to visit other incompetent persons, or persons who were thought to be incompetent, where there had been questions, that the judge had always taken a stenographer.

"The Court: Well, you know, Mr. Lavine, I am a judge and not—

"Mr. Lavine: That's right.

"The Court: And I do not see why you are bringing that up because I never do anything off the record, but a psychiatrist can be cross-examined on his opinion, but to form his opinion I think any of the doctors will testify—I have heard many of them testify they have to make an examination in the usual way, and that is without the presence of a stenographer or any other witness, but that has nothing to do with me.

"Mr. Lavine: May I continue my offer of proof, if your Honor will permit me to make this offer of proof, and I would like to make it as a matter of law.

"The Court: All right, Mr. Lavine.

"Mr. Lavine: That the doctor then left Mr. Buchman's presence and went to the telephone and excluding Mr. Buchman he had the conversation and later came

deemed to have been made before the ruling; he rejected the offer to proof and rejected an offer by Mr. Lavine to have appellant go to an independent phychiatrist providing the psychiatrist did not talk with either side and was willing to have a reporter present and the hearing taken down or have a recording device present to record the examination. The judge again stated that the executor was removed. Findings of fact and conclusions of law were thereafter made. The findings were in part predicated on the unreported conference between the judge and counsel in chambers. The conclusions of law were that the executor was so mentally deranged as to be incompetent to act as executor and (written in longhand by the judge) "That said

---

back and said that he had talked with the trial judge in the matter, Judge Condee, and had a conversation, and he was engaged in this conversation for ten to fifteen minutes; that afterwards the doctor said he wouldn't have the examination taken in the presence of a stenographer; that thereafter, Mr. Buchman returned, and called his attorney, Morris Lavine, and I advised him to see some other psychiatrist immediately, and he went to see Dr. Victor Parkin and was examined by Dr. Victor Parkin for a matter in excess of two hours; that Dr. Victor Parkin is a psychiatrist of many years standing in this County; that he is on the Judges' list of this County as a qualified psychiatrist to be called by the various judges; that for at least 20 years last past he has been a psychiatrist called by the District Attorney's office of Los Angeles, and that he has been called in by the District Attorney's office in many other counties in this State; that he has been a Government witness on behalf of the United States Government in psychiatric cases; he is a member of the County Medical Board and a member of the Lunacy Commission; that he has examined thousands of cases of mental—involving mental questions and he has given his opinions to various courts during at least 25 years to my knowledge, and probably longer; that Dr. Victor Parkin is present in this courtroom to give the court the benefit of his opinion; that it is the opinion of Dr. Victor Parkin, if he is allowed to testify, that Hamlin Buchman is qualified and business-wise, that he is mentally qualified; that he is not in anywise incompetent; that he fits all of the requirements of the statute in regard to the competency of an executor; that he is able to manage his business affairs; that he is able to manage the affairs of business of others; that he has understanding; that he is a very acute business man; that he has capacity and understanding in handling his business affairs and that he is presently, in the opinion of the doctor, well qualified to continue and mentally fit and competent to continue in this position; that all of the matters which a psychiatrist generally asks were taken down by a stenographer in the presence of Mr. Buchman and in the presence of Dr. Parkin; that Dr. Parkin has conducted numerous psychiatric examinations in the presence of stenographers, and that it has been the custom of those examined in matters involving at least criminal cases for a long time that psychiatrists do take the questions and answers down; that these questions and answers are some-

Buchman did not file his inventory in the time prescribed by law." An order was thereupon entered removing appellant as executor and revoking the letters testamentary issued to him.

Appellant contends: he was denied due process of law; the trial judge prejudged his mental competence; he was removed without any evidence; the order of removal was arbitrary and capricious; the court erred in rejecting the offer of proof.

It is the universal rule that a testator may name the person who shall be the executor of his will, and such person has a right to act in the absence of a specific statutory disqualification. *In re Estate of Wellings,*

---

times taken down by a recording device today, or at least in one instance to my knowledge in a case in this court a psychiatrist took a complete set of questions and answers by such a recording device during the course of the interview, and that it is presently practiced by a number of psychiatrists today; and that this petitioner had a right to do so and had a right to have his counsel understand those matters.

"I offer further to prove by Dr. Parkin that the presence of a third party during the interview is not inimical to or contrary to the best interests of the psychiatric examination, nor to form and prepare an intelligent opinion of the person's understanding, qualifications, capability, honesty, and integrity.

"I offer to prove also that in so far as one of the grounds on which your Honor has removed the executor, the fact that he filed an inventory late, and that that was no fault of his, but the fault of the appraiser, and that the matter was in the appraiser's hands, and that the appraiser was appointed by this court, and that is the only thing that has been pointed out in this proceeding that would in anywise raise any technical ground.

"That your Honor in relying on the technical ground has overlooked the fact that this is a testamentary appointment; that the appointment was made in this case by the deceased in his will, and that in making that testamentary appointment he left three-quarters of the estate, and perhaps the entire estate, to this executor, and that there is a serious question as to whether the objectors have any interest whatsoever in the estate. It involves a question of law which has not been finally resolved by this court or any other court, and that to remove him would be an abuse of discretion in piling a large amount of costs upon this executor that should not be piled upon him, because he is qualified financially, he has handled business matters for a number of years and he had entered into contracts as recently as this last month, all of which have shown an understanding in financial matters and business matters in this respect.

"That is my offer of proof, your Honor.

"I am also informed that the citation in this matter was not served upon the executor himself; that there was no personal service upon Mr. Buchman at any

192 Cal. 506, 510, 221 P. 628; Annotations, 95 A. L. R. 828; 54 Am. Dec. 518. It has been held that, in the absence of some statute, the power to name an executor to administer an estate is coextensive with the power to bequeath or devise the estate itself. *In re Guye's Esate,* 54 Wash. 264, 103 P. 25, 26, 132 Am. St. Rep. 1111.

The same considerations apply to the removal of an executor. A testator's selection of an executor should not be annulled except on a clear showing that the best

---

time of the citation in this matter. I note the citation was signed by George I. Devor. I do not believe that it was ever served upon Mr. Buchman, personally.

"The Court: Well, I do not want to be unfair to Mr. Buchman, but when the matter of his incompetency is called to the court's attention the court must act in the matter.

"We have the record of the other afternoon, we have the record of the examination in chambers, and I was actually ready to act at that time. I had no intention of making this a panel of psychiatrists. I have had Dr. Parkin, he is well known to me. He is one side and some other is on the other side. As I say, I don't want to infer any disrespect to the psychiatrists, because they always take sides, and that is why I am anxious to always get one who takes it for no other reason than to get the facts that he believes true.

"Now, if an independent psychiatrist had made a full and favorable report as to Mr. Buchman recently, which I can't believe any one could if he had heard the hearing the other afternoon, and that record stands. And then his evasiveness of the treatment on consultation and so forth, and the record is here. That may be a matter that you can take advantage of, Mr. Lavine, on appeal. But I have made the order and I am going to stand upon the record. . . .

"Mr. Lavine: Your Honor said something about an independent psychiatrist.

"The Court: Yes.

"Mr. Lavine: We still offer to have Mr. Buchman go to an independent psychiatrist, providing that psychiatrist doesn't talk with either side or any one and is willing to have a reporter and the hearing taken down.

"The Court: Well, since it has been suggested that the court talked to Dr. McNeil, the court only knows him in connection with two cases here in which he seemed to be very competent, and the clerk put him on yesterday afternoon and he said that Mr. Buchman was there but he would not proceed with the examination without a reporter, and I asked him, 'Do you want to make an examination that way?' and he said, 'No, that is not the usual way to make an examination,' and I said, 'That is entirely up to you.' And that is the extent of the conversation. And until I got the report this morning I did not know the report had not been made.

"Mr. Lavine: Well, we are still willing to have a doctor who has a recording device and nobody else present. Some of these doctors have and they take down a complete report, they have a recording device.

"The Court: Well, the matter is closed and you have your record and you are lucky you haven't got more of a record, you have more of a fighting chance to get it reversed."

interests of the estate require it. *In re Estate of Sherman,* 5 Cal. 2d 730, 744, 56 P. 2d 230.

Appellant did not have an "Achilles' heel" because of the delay in filing the inventory until it was established that the delay was willful or that he was negligent and the delay had caused detriment to the estate. The general rule is that an executor or administrator will not be removed for the mere delay or failure to file an inventory within the time prescribed by the statute, unless the delay or failure has caused a loss to the estate. *In re Chadbourne's Estate,* 15 Cal. App. 363, 114 P. 1012; *Willoughby v. Willoughby,* 203 Ala. 138, 82 So. 168, 169; *In re Fehlmann's Estate,* 134 Or. 33, 292 P. 1029, 1033, 72 A. L. R. 949; 33 C. J. S., Executors and Administrators, § 90c, page 1035; 21 Am. Jur. 459, § 153. The burden of proving that the delay in filing the inventory was willful or negligent was on the petitioner, and appellant had the right to rely on the presumption of fair conduct and faithful performance of official duty until something was offered to overcome it. Anyone with any knowledge of the probate of estates knows that in many cases the filing of the inventory is unavoidably delayed without the fault of the representative. To refuse to permit an executor to introduce evidence in his own behalf which tends to show reason for the delay, as was done in the present case, is to deny him the opportunity to be heard. 11a Cal. Jur. 423, § 303.

In re Graber, 111 Cal. 432, 44 P. 165, was an appeal from an order denying a petition to revoke letters testa-

mentary for failure to file an inventory within the time prescribed by the statute. It was contended the statute was mandatory. The court held it was directory, saying, 111 Cal. at page 435, 44 P. at page 165: The statute says the court may, *upon notice,* revoke the letters testamentory or of administration. The fact that such revocation can only take place after notice is a clear indication that the executor or administrator is to be given an opportunity to come before the court and show cause why his letters should not be revoked."

In re Chadbourne's Estate, 15 Cal. App. 363, 114 P. 1012, was an appeal from an order removing an executor for failure to publish notice to creditors within the statutory period. Reversing the order, the court made these pertinent observations, 15 Cal. App. at pages 367, 371-373, 114 P. at page 1013: "[I]t should be and is the policy of the law to give effect, as far as it can be legally done, to the expressed will of the deceased. The nomination of the executor is evidence of the confidence reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed as to the administration should not be thwarted, unless the plain provisions of the law or the interests of justice demand it. . . . It has been declared that 'the principle governing the disposition of applications such as this is expressed in the phrase 'whom the testator will trust so will the law." . . . The reason for taking away the authority of a person so chosen should be well grounded upon undoubted proof of his utter improvidence and unfitness for the duties of his trust.' . . .

In *Haines v. Carpenter,* 1 Woods, 262, Fed. Cas. No. 5, 905, it is said: 'A strong case must be made out to induce the court to take possession of the property from an executor who has qualified and given bond for the faithful discharge of his trust and has taken possession under the will.' . . . It may be said also that he is commanded to file his inventory within a certain time. . . . Yet if he fails to do so, and has a sufficient excuse, the court will overlook his default. *In re Garber* [111 Cal. 434, (44 P. 165).] . . . So in *Hubbard v.* Smith, 45 Ala. 516, where the administrator had failed to return an inventory in the time required by law, the court said: 'He ought to have filed an inventory, as any other administrator is required to do, and to have made annual settlements, but the mere omission to do so when he was not negligent and there has been no detriment to the estate is not ground for reversal.' Indeed, the cases are numerous where there has been a technical violation of the law, and yet where the delinquent has been relieved of the penalty on account of inadvertence, surprise, or excusable neglect. . . . There is also the other consideration of some moment that the forfeiture of an office is involved, and the rule is that such provisions must be strictly construed, and forfeiture is not favored."

No man is infallible; the wisest makes mistakes; but the law holds no executor responsible for the consequences of his mistakes which are the result of the imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty. There was no showing that appellant did not act in the

utmost good faith and with a sincere purpose to discharge as promptly as possible his legal duty; nor was it made to appear that by reason of delay in the filing of the inventory any detriment was caused to the estate.

In re Estate of Richardson, 74 Cal. App. 2d 350, 168 P. 2d 774, relied on by respondent, is not in point. In that case the executor did not file the inventory until twenty months after his appointment. I appears from he record that a citation was issued; a hearing was had; witnesses were sworn, examined, and cross-examined. The executor was given an opportunity to explain the delay and to show reasonable cause for not filing the inventory within the statutory time. The trial court concluded that the executor had not satisfactorily explained or shown reasonable cause for the delay. The effect of the holding on appeal was merely that the trial court's finding that the executor had neglected the estate was supported by the evidence. The Richardson case has no application to the facts in the present case.

Section 521 of the Probate Code provides: "Whenever a judge of the court has reason to believe from his own knowledge, or from credible information, that any executor . . . is incompetent to act, . . . he must cite such executor or administrator to appear and show cause why his letters should not be revoked, and may suspend his powers until the matter is investigated." Section 522 reads: "Any person interested in the estate may appear at the hearing and file allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator

may demur or answer, and the issues shall be heard and determined by the court." Section 523 provides that if the executor appears "and the court is satisfied *from the evidence* that there exists cause for his removal, his letters must be revoked." (Italics added.) Section 1230 provides that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. . . ."

Whenever a judge has reason to believe from his own knowledge or from credible information that an executor is incompetent to act he may, but is not required to, suspend his powers before citing him to appear and show cause why his letters should not be revoked. *In re Estate of Healy,* 137 Cal. 474, 475—476, 70 P. 455. Suspension is not a necessary step looking to a removal of an executor. Suspension may take place without a citation, notice, or hearing; while removal cannot. *In re Estate of Kelley,* 122 Cal. 379, 382, 55 P. 136. Upon obtaining the information specified in section 521, it is the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. He may not remove an executor on any of the grounds specified in section 521 without citing him to appear and giving him a fair hearing and an order predicated on evidence. See *Schroeder v. Superior Court,* 70 Cal. 343, 11 P. 651.

In re Moore, 83 Cal. 583, 23 P. 794, was an appeal from an order removing an administrator. Prior to the proceeding in which the order was made, a petition for the removal was heard and denied. The widow petitioned to be appointed administratrix on the ground

that two years previously the administrator had been committed to an insane asylum. Her petition was denied and she appealed. On appeal it was held that the fact the administrator had been sent to an insane asylum did not create an absolute vacancy in the administratorship of the estate; the application having been made after his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, the court properly refused to appoint another in his place. *In re Estate of Moore,* 68 Cal. 281, 9 P. 164. After that decision on appeal, the widow again petitioned for the removal of the administrator on the ground, among others, that he was incompetent to act. The trial court ordered that he be removed. The administrator appealed from the order. The expression of the court in reversing the order is particularly apposite in the case at bar. It said, 83 Cal. 586, 23 P. 794:

"The judgment is clearly erroneous. If it be conceded that there is an allegation in the petition upon which the finding of the court could be based, there is not a word of evidence in the record to support the finding. The only evidence offered by either party on the question of delay in the settlement of the estate was offered by appellant, and tended to show that the administration of the estate had been prolonged by reason of litigation, for which the administrator was not responsible; but the court, on the objection of respondent, excluded it. If it be assumed that the fact that the administration of the estate was continued for 16 years without a final account, is sufficient, *prima facie,* to

justify the finding, it was clearly error to reject evidence offered by appellant tending to excuse the delay in closing the estate. To show unavoidable delay and good faith, the appellant was entitled to introduce in evidence, if he desired to do so, every paper in the case which tended to show the history of the various proceedings had therein, from their commencement to the time of trial. But, as a matter of fact, it is apparent that the issue referred to was abandoned by the petitioner at the trial. He made no attempt to prove his allegation. The burden of proof rested on him, and not upon the administrator; but he offered no evidence of negligence, or of injury by reason of delay. Appellant had the right to rely upon the presumption of fair conduct and faithful performance of official duty until something was offered by the petitioner tending to overcome it, and the mere fact that the proceeding had been pending for 16 years did not throw upon him the duty of disproving the charge of negligence.

"The court could not, of its own motion, remove the administrator without giving him an opportunity to be heard. Sections 1436-1440, Code Civil Proc. [Now Prob. Code, §§ 521-523]. Nevertheless, this is practically what was done in this case; for not only was there no evidence offered by the petitioner to show unnecessary delay in the settlement of the estate, but, as stated before, the administrator was no allowed to introduce evidence in his own behalf which, if admitted, would have tended to show that for about 10 years the widow had been prosecuting a claim for certain sums of money alleged to be due her as family allowance,

and that the litigation had terminated, only a few days before the trial of this action, in a judgment denying her petition. . . . In *Deck's Estate v. Gherke,* 6 Cal. [666] 667, it is stated, in the statement of facts, that the order removing the appellant from the administration was made on an order to show cause. That case is authority only for the proposition that the appellate court will interfere with the exercise of the power conferred upon the probate judge in such matters only where there has been gross abuse of discretion. All the cases agree upon that matter. Here, there was no evidence at all introduced in support of the charge of wrongfully prolonging the administration."

In Re Estate of Wacholder, 76 Cal. App. 2d 452, at page 464, 173 P. 2d 359, at page 366, this court, reversing an order removing an executor, said: "While it is the clear duty of the court to remove an executor or administrator when his unfitness has been proved, it is at the same time the right of every trustee to receive full acquittance of charges impugning his integrity or competence which are not established by clear and satisfactory evidence."

Where the statute prescribes the steps necessary to be taken to remove an executor, the statutory requirements must be complied with, and an order of removal not predicated on such compliance is unauthorized and ineffectual. 33 C. J. S., Executors and Administrators, § 91b, page 1039. Before an executor is removed he must be accorded a hearing and the court must have some fact legally before it in order to justify

removal. The facts relied on for removal must be established by evidence, and any proper evidence which tends to establish or refute the charges relied on is admissible. *Hanifan v. Needles,* 108 Ill. 403, 409-412; *In re Paull's Estate,* 90 Ohio App. 403, 101 N. E. 2d 209; *In re Glessner's Estate,* 343 Pa. 370, 22 A. 2d 701; *In re Burr,* 118 App. Div. 482, 104 N. Y. S. 29; 33 C.J.S., Executors and Administrators, §91f and g, page 1042.

Luckey v. Superior Court, 209 Cal. 360, 287 P. 450, relied on by respondent, is not analogous. In *Luckey* an administrator was removed. A hearing was had. The proceeding was not instituted pursuant to Section 1436 of the Code of Civil Procedure, now Section 521 of the Probate Code. The present proceeding was had under Section 521. The nub of the holding of the *Luckey* case is that an administrator may be removed on grounds other than those specified in Section 521. See *In re Estate of Guzzetta,* 97 Cal. App. 2d 169, 217 P. 2d 460.

The fundamental conception of a court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean

according to the whim, caprice, or will of a judge, *Matter of Lambert,* 134 Cal. 626, 632-633, 66 P. 851, 55 L. R. A. 856; it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence. *Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm.,* 74 Cal. App. 2d 911, 170 P. 2d 36.

Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly.

The constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in

the present case. The judge's conception of his duty was entirely erroneous. The plainest principles of justice required that appellant be given notice of the spefic charges against him. No notice was given him that he was to be removed on the ground that he was so mentally deranged as to be incompetent to act as executor. If the judge had reason to believe from what was told him in chambers, or from appellant's conduct, or from both, that he was incompetent to act, he had the authority to suspend his powers. He had no authority or power, without notice or hearing, to remove him. Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing, either on the charge that the inventory was not filed in time or on the ground, not charged, that he was so mentally deranged as to be incompetent to act as executor. No legal evidence was produced that he was incompetent to act. He was denied the opportunity of presenting any evidence. His offer of proof was erroneously rejected. In short, he was denied due process of law.

Reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. The judge noticed that petitioner was emotionally upset by the proceedings and for that reason removed him. Under the circumstances the fact that appellant was disturbed by what was going on was not evidence of incompetency. It was enough to disturb any normal, self-respecting person.

APPENDIX B

[Civ. No. 20331. Second Dist., Div. Two. Apr. 1, 1955]

Estate of H. G. BUCHMAN, Deceased. HAMLIN K. BUCHMAN, Appellant, v. CLAIRE MORSE, et al., Respondents.

APPEALS from orders of the Superior Court of Los Angeles County decreeing partial distribution and settling accounts. Newcomb Condee, Judge. Order decreeing partial distribution affirmed; order settling accounts modified.

Morris Lavine for Appellant.

Jerry Giesler and George I. Devor for Respondents.

FOX, J.—Hamlin K. Buchman, executor of the estate of his late brother, Harry G. Buchman, has filed two appeals. One is taken from an order decreeing partial distribution in favor of Claire Morse, decedent's former wife, hereinafter termed respondent; the other is from an order settling certain accounts filed by appellant. Various assignments of error arising in connection with the disposition of the several proceedings herein are also presented for review and will be adverted to subsequently.

Respondent became the wife of the decedent on November 7, 1949. No children were born of this marriage. By the spring of 1951, marital differences and difficulties had developed between the spouses to a point which impelled decedent to discuss with his then

counsel, Isaac Pacht, the matter of negotiating a property settlement agreement with his wife. Thereafter, on about May 28, 1951, the decedent discussed with his attorney his desire to make a will, and submitted instructions as to the contents of the proposed document. On June 7, 1951, a form of will embodying these instructions was mailed to decedent in Chicago by his counsel. According to Pacht's testimony, this proposed will contained the following provision: "I declare that except as otherwise provided in this will I have intentionally and with full knowledge and not by accident or mistake omitted to provide herein for any of my heirs living at the time of my death. This includes specifically, but is not limited to, my wife, Claire Buchman (respondent)." There is no record that the proposed will was ever signed by decedent.

On June 29, 1951, decedent executed the will which was admitted to probate. It was a one-page document naming Hamlin K. Buchman as executor and contained two dispositive clauses, as follows:

"SECOND: I give, device [sic] and bequeath unto my beloved wife, CLAIRE BUCHMAN, one-fourth (¼) of my entire residuary estate.

"THIRD: I hereby give, devise and bequeath unto my beloved brother, HAMLIN K. BUCHMAN, three-fourths (¾) of my entire residuary estate, and in the event of the death of my wife CLAIRE before my death, then I devise and bequeath to my said brother, HAMLIN K. BUCHMAN, my entire residuary estate."

On July 2, 1951, respondent and decedent separated and thereafter maintained separate living arrangements. On August 2, 1951, a property settlement agreement was entered into by the spouses. Both parties had the benefit of independent legal assistance; decedent was, during the negotiations, represented by the firm of Pacht, Tannenbaum and Ross, while respondent employed Jerry Giesler as counsel. The agreement arrived at is fairly lengthy. In its preamble appear the following recitals: "In addition to the other differences which have arisen between the parties, certain differences and disputes exist with reference to the property interests of the parties. The parties are the owners of certain property. Husband contends that all property, title to which is vested in him or for his account, is his separate property, and wife contends that certain of said property is community property of the parties. The parties are mutually desirous of making a full, complete, permanent and final settlement of all of their respective rights in and to said property and any property which may hereafter be acquired by either of them, and, as a part of said settlement, each of the parties desires to relinquish any and all claims, past, present and future, against the property or estate heretofore or hereafter acquired by the other party, his or her executors, administrators, heirs, successors or assigns, and to finally settle, determine and dispose of all rights and matters of maintenance, support, inheritance, homestead, and each and every claim either party had, now has, or may have against the other party."

The agreement contains 19 numbered paragraphs and two exhibits. The provisions most pertinent to the question with which we will be here concerned read as follows:

"2. Concurrently with the execution of this agreement Husband shall pay to Wife the sum of Two Thousand Five Hundred Dollars ($2,500.00) in cash, the receipt of which is hereby acknowledged.

"3. Upon the effective date of this agreement Husband shall pay to Wife the sum of Twenty-Two Thousand Five Hundred Dollars ($22,500.00) in cash.

"4. Husband does hereby transfer, convey, set over, assign and quitclaim to Wife, as her sole and separate property, any and all right, title and interest that Husband has in and to the following: (The items are set out in the margin.)[1]

"5. Wife does hereby transfer, convey, set over, assign and quitclaim to Husband, as his sole and separate property, any and all right, title and interest that Wife has in and to" certain described property which it is not necessary to set out. Section (e) is pertinent and reads:

"(e) Any and all insurance policies owned by, payable to, or insuring the life or property of, Husband, a description of said life insurance policies being contained in the list of life insurance policies attached

[1]The property referred to consists of all clothing, money, jewelry and personal effects in respondent's possession and all money and securities standing in her name; a 1949 Cadillac convertible; virtually all the furniture and furnishings in the apartment occupied by the parties; all the personal property and furnishings in storage; and all of the respondent's personal effects in a certain house trailer.

hereto, marked Exhibit B,[2] and which list is by this reference hereby incorporated herein. In connection with the said life and property insurance policies, Wife agrees to execute and deliver to Husband, at his request, any and all assignments, quitclaims, changes of beneficiary and other instruments and forms which Husband may request to vest in Husband the complete ownership of said insurance policies, both legal and equitable, including the right to change the beneficiaries thereof free and clear of any claim, right, title or interest of Wife."

"7. Each party hereto waives and relinquishes, except as in this agreement otherwise provided, any and all rights which he or she may now or hereafter have to succeed to the estate of the other; and each hereby expressly waives and relinquishes any and all rights to act as personal representative or to nominate a personal representative of the estate of the other, or to have set aside to him or to her any of the property of the other as community property, or to have set aside to him or to her by any Court having jurisdiction of any portion of the estate of the other any homestead or other property which might be set aside to a surviving husband or widow as exempt property, or to demand any family allowance, or any other right, benefit or emolument from the estate of the other, and both parties hereto agree that each will never exercise any right to select a homestead from the property of the other during his or her lifetime.

[2]Exhibit B lists three life insurance policies, each in the amount of $10,000.

"8. It is expressly agreed between the parties hereto that this instrument is a full, complete and final memorandum of the agreement of the parties hereto covering all matters in connection with the division of the community property of the parties and all rights and claims of each and both of the parties therein or thereto, and in or to the separate property of either party, and of each and every claim of every character whatsoever one against the other, and that no agreement exists between the parties other than as herein specifically set forth; and it is hereby covenanted and agreed by each of the parties with the other that he or she will not assert or claim against the other any right or claim in or to any property of the other, except under the terms of this agreement, and except as provided by the terms and provisions of this agreement, and will not assert against the other except as herein otherwise specifically provided, any claim for alimony, maintenance or support, costs, attorneys' fees or any other claim whatsoever by reason of their marital relationship or otherwise, or in any action for divorce or separate maintenance, or in any other action or proceeding involving the marriage state or any obligations thereof wheresoever brought.

"10 (b) Husband agrees to pay and hold Wife harmless from obligations incurred by the Wife to the following creditors only and in amounts not exceeding the amounts set forth opposite the names of said respective creditors, to-wit:

Bullock's	$116.75
Bullock's Wilshire	201.48
The French Bootire	20.49
Saks Fifth Avenue	307.51
Total	$646.23*3

"13. All of the covenants, provisions and agreements in this instrument contained shall apply to, be binding and obligatory upon, not only the parties hereto but also their respective heirs, executors, administrators, successors and assigns. . . .

"16. Anything contained in this agreement to the contrary notwithstanding, it is expressly understood and agreed that this agreement shall be of no force or effect unless or until it shall be approved by the Court in divorce proceedings between the parties instituted in a court of competent jurisdiction and incorporated in and made a part of the decree or judgment of the Court in such proceedings, the parties hereby agreeing that this agreement shall be submitted to the Court in which any such proceedings are pending with the request that it be approved by said Court as being fair and equitable, and be incorporated in and made a part of the judgment or decree of said Court in such proceeding.

"17(b) Should this agreement be submitted for approval in a divorce action between the parties, and the Court fail to approve the same, then this agree-

*3In a letter written on the day the property settlement agreement was executed, decedent agreed to pay three additional bills that respondent owed, aggregating almost $500, "but none other."

ment shall be of no force or effect, and said action shall thereafter proceed as an adversary action after reasonable notice thereafter given to each of the parties.

"18. The 'effective date of this agreement' hereinbefore referred to in this agreement shall be the day upon which a decree of divorce in favor of either party hereto shall be entered in an action brought as hereinbefore provided in paragraph 16.

"19. Concurrently with the execution of this agreement Husband shall deposit in trust with Pacht, Tannenbaum & Ross and with Jerry Giesler jointly, the respective attorneys for said parties, as trustees, $25,000.00 to be used by said trustees to discharge on his behalf the obligations referred to in paragraphs 3 and 17(a)[4] hereof, and said trustees are here irrevocably authorized and instructed to pay said funds to the respective parties to whom payments are to be made pursuant to said paragraphs, upon the furnishing to each of said firms of attorneys of a certified copy of the decree of divorce referred to in paragraph 18 hereof."

Upon execution of the agreement, respondent received and has retained the consideration of $2,500 noted in paragraph 2. The sum of $25,000 referred to in paragraph 19 was deposited in trust with counsel for the respective parties to discharge the obligations contemplated by the terms of paragraphs 3 and 17(a), where it has since remained. Ownership of the items of property designated in paragraphs 4 and 5 was as-

[4]This section commits decedent to pay $2,500 to Mr. Giesler as attorney's fees for services rendered to respondent upon the effective date of the agreement.

sumed by the decedent and respondent as set out therein.

In the middle of August, respondent departed for Nevada. She had sojourned there for about three weeks when her husband died in Chicago on September 4, 1951. On the 19th of September, appellant became special administrator of the decedent's estate. The will executed under date of June 29, 1951, in which appellant and respondent were named as residuary legatees and devisees of the estate in the proportion of three-fourths and one-fourth thereof, respectively, was admitted to probate on October 16, 1951, and letters testamentary were issued to appellant as executor.

The course of the ensuing proceedings, extracting only those here germane, is best delineated in their chronological sequence:

April 3, 1952: Respondent filed a contingent creditor's claim against decedent's estate.[5]

May 12, 1952: Appellant filed an inventory and appraisement of the estate. Three supplementary inventories and appraisements were filed thereafter, the last on March 11, 1953. As of March 13, 1953, the total net assets of the estate were close to $500,000.

Jan. 16, 1953: Appellant filed his First and Final Account and Report of Special Administrator and a

[5]Said claim reads in part: "In the event that it should be ultimately adjudged that the Claimant is not entitled to take under the Last Will and Testament of the decedent, as aforesaid, then Claimant demands the following sums of money:

"The sum of $22,500.00 as and for the payment required to be made to her under the provisions of paragraph '3' of said agreement so dated August 2, 1951.

"The sum of $2,500.00 in exoneration of her liability under the terms and provisions of paragraph '17(a)' of said agreement."

First Account Current and Report of Executor. Respondent filed objections to these accounts on January 27th and February 9, 1953.

Jan. 26, 1953: Respondent filed a petition for citation for the removal of appellant as executor. The citation was issued commanding appellant to show cause why the letters testamentary should not be revoked and he should not be removed as executor. Concurrently, she filed a petition for Partial Distribution in the sum of $24,000. A citation was issued requiring the executor to show cause why the court should not make an order distributing the sum prayed for.

Feb. 13, 1953: Appellant filed answers to the petitions filed by respondent on January 26. In answering the petition for partial distribution, appellant alleged the existence of substantial encumbrances against certain real property belonging to the estate; as an affirmative defense, appellant asserted that respondent was estopped by her acceptance of the benefits of the property settlement agreement from taking under the will, and that by virtue of the terms of said agreement she had waived and relinquished her right to take under the will.

March 11, 1953: The several petitions filed by respondent, various petitions for attorney fees and extraordinary fees, and settlement of and objections to appellant's accounts as executor and administrator came on for hearing before Judge Condee. It was stipulated that the matters might be heard together and "that evidence competent in any of the matters

may be received and at the end the court will sort it out and make a separate ruling in each matter." There was no stipulation that these matters might be consolidated nor was any order made that they be consolidated. Thereafter, Judge Condee stated that his initial concern was with regard to appellant's competency to continue as executor. The hearing was continued to March 13th.

March 13, 1953: Upon resumption of the hearing, Mr. Lavine, present counsel for appellant, appeared and requested that he be substituted as counsel of record. Judge Condee consented only that he appear specially, on a phase of the removal proceedings. At the conclusion of this proceeding, Judge Condee made an order removing appellant as executor.[6] This order was reversed upon appeal in *Estate of Buchman,* 123 Cal. App. 2d 546 [267 P. 2d 73], the court holding that the removal was accomplished in violation of appellant's constituional right of due process, in that he had not been given specific notice of the charges against him or an opportunity to be fairly heard thereon.

April 2, 1953: Appellant filed a substitution of attorneys. Concomitantly therewith, he filed a petition to determine heirship,[7] with a prayer that the issues

[6]The Citizens National Trust and Savings Bank was thereupon appointed special administrator with general powers.

[7]As an outgrowth of this petition, a series of motions was filed by both sides. On April 10, 1953, respondent filed a motion to vacate the setting of this petition. On April 20, appellant filed a motion to strike respondent's motion to vacate the setting, and his objections thereto. On May 1, 1953, respondent filed a motion to abate and dismiss appellant's petition to determine heirship. Thereupon, appellant filed a motion to consolidate his petition to determine heirship with the petition for partial distribution previously filed by respondent. The rulings on these motions are given under date of May 14, 1953, *infra.*

be tried by jury. Hearing thereon was set for April 23d. A formal demand for a jury trial in connection with this petition was filed on April 7th.

April 6, 1953: Appellant filed objections to the hearing of the petition for partial distribution by Judge Condee, alleging Judge Condee to be biased and prejudiced against him, and objecting to the hearing of any matters relating to the estate of decedent by said judge. In accordance with section 170 of the Code of Civil Procedure, appellant submitted his affidavit of bias and prejudice. Thereupon, Judge Condee continued all the various matters before him to May 18, 1953.

April 8, 1953: Judge Condee filed an affidavit in response to the motion to disqualify him. The judge controverted the statements in appellant's affidavit, denied "that by reason of any bias or prejudice Mr. Buchman cannot have a fair and impartial trial" before him and averred that in removing appellant as executor he was motivated only by the desire to preserve the estate.

April 23, 1953: Presiding Judge Philip H. Richards, having been duly charged with the determination of the issue of Judge Condee's asserted disqualification, filed his order and finding that the said judge was not disqualified to hear the pending matters.

May 14, 1953. Judge Victor R. Hansen made the following orders with respect to certain of the various motions relating to appellant's petition to determine

heirship (see footnote 7, *supra*): (a) overruled appellant's objections to the motion of respondent to vacate the setting of said petition; (b) denied appellant's motion to consolidate the petition for partial distribution with the petition to determine heirship;[8] (c) granted respondent's motion to vacate the setting of appellant's petition to determine heirship and ordered said petition "off calendar."

On this date, appellant filed a motion to be relieved from waiver of jury trial in the partial distribution proceeding.

May 18, 1953: The proceedings which had been initiated on March 11th, and which had been continued on April 6th, were resumed before Judge Condee. Appellant's motion to be relieved from waiver of jury trial was denied. The matters then were tried before the court.

June 8, 1953: Appellant filed a "Supplementary to First and Final Account and Report of Executor." Respondent filed her objections thereto on June 11th.

Sept. 29, 1953: The court entered its order settling the several accounts previously filed.

Nov. 23, 1953: The court filed its decree granting respondent's petition for partial distribution in the sum of $24,000.

Appellant has filed briefs totaling almost 250 pages, raising many issues and prolix in his citation of au-

[8]The court also denied appellant's motion to strike respondent's notice of motion to vacate the setting of the petition to determine heirship.

thorities. Succinctly stated, the paramount question is whether the property settlement agreement effectively precludes respondent from taking the testamentary dispositions in hr favor under decedent's will. Appellant asserts that by virtue of the agreement, respondent relinquished her right to claim any part of the estate which decedent might leave to her by will. By its express terms, the agreement categorically declares that it shall be of no force and effect until approved by a court in divorce proceedings. (See paragraph 16, 17(b) and 18, *supra*.) Despite the nonoccurrence of this condition precedent, appellant argues, in miscellaneous variations on the theme, that respondent is nonetheless bound by this agreement. In support of this thesis, he contends respondent is bound because she never rescinded the agreement, because she never restored or offered to restore the money and property she received under it, that she is thereby estopped from denying the agreement became effective upon its execution, and finally, that paragraphs 16 and 18 were dispensed with by death, and, in any event, should be disregarded. Respondent's brief has cogently met and effectively demolished the premises on which these arguments are predicated. However, it is here unnecessary that we engage in any extended inquiry into these issues, for even if we concede, *arguendo,* that the contract became binding upon the parties, appellant still cannot prevail on this phase of his case. For a textual examination of that document discloses that, under the controlling authorities, respondent is not foreclosed thereby from taking by bequest or devise under decedent's will.

The rule has become firmly crystallized in this state, by an unbroken concatenation of decisions, that unless a property settlement agreement expressly renounces the right to take by will, or the intention to accomplish such result appears by necessary implication, the agreement will not preclude the surviving spouse from taking what the decedent might choose to bequeath or devise. (*Estate of Crane,* 6 Cal. 2d 218, 220-221 [57 P. 2d 476, 104 A.L.R. 1011]; *Estate of Bartola,* 124 Cal. App. 2d 727, 728, 730 [269 P. 2d 30]; *Estate of Hadsell,* 120 Cal. App. 2d 270, 272 [260 P. 2d 1021]; *Estate of Johnson,* 31 Cal. App. 2d 251, 258 [87 P. 2d 900]; *Nichols v. Board of Retirement,* 121 Cal. App. 2d 176, 180 [262 P. 2d 862]. See *Grimm v. Grimm,* 26 Cal. 2d 173, 176, 177 [157 P. 2d 841]; *Bennett v. Forrest,* 24 Cal. 2d 485, 493 [150 P. 2d 416]; *Shaw v. Board of Administration,* 109 Cal. App. 2d 770, 776 [241 P. 2d 635]. The definitive expression of this principle appears in the leading case of *Estate of Crane, supra,* which has been followed in many other jurisdictions.[9] In that case, the property settlement agreement contained the following language:

". . . 'It is further expressly covenanted and agreed that neither of the parties hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfer with the other, his or her heirs, or assigns, in the exercise of the rights of property herein agreed

[9]*Berg v. Berg,* 201 Minn. 179 [275 N.W. 836]; *Bartle v. Bartle,* 121 Colo. 388 [216 P. 2d 649]; *Swann v. Swann,* 131 W. Va. 555 [48 S.E. 2d 425]; *First Nat. Bank of Princeton v. Miley,* 3 N. J. Super. 348 [65 A. 2d 553]; *In re Darrow's Estate,* 164 Pa. Super. 25 [63 A. 2d 458].

to; that neither of them will at any time hereafter assert any right, interest or title as heirs at law of the other *or as against the estate of the other, and all claim or right as surviving husband or wife, and all right to contest or oppose the last will of the other is hereby expressly waived,* together with all right to administer, or to apply for letters of administration, or *letters of administration with the will annexed,* upon the estate of the other . . . *It is the true intent and purpose of this agreement that the parties hereto have settled and forever adjusted, and that they do hereby settle and forever adjust, by and between themselves, all present and future property rights of every kind and nature, whether community or separate, wheresoever the same is or may be located and all other rights and claims which either may have or claim to have against the other,* so far as their property rights are concerned, and in addition thereto that the said parties hereto have settled and adjusted, and do *hereby settle and adjust, and forever determine, all of their respective rights, to, of and in any inheritance the one from the other, respectively, or in or to the estate of either.'* " (Emphasis added.)

In deciding that the surviving widow was entitled to a bequest under her deceased husband's will, our Supreme Court stated (pp. 220-221): ". . . In this case the parties by the terms of their agreement did make reference and contract with relation to the will or wills of both or either of them, whether then existing or thereafter to be made. But the agreement in relation to such wills was not unlimited. The agree-

ment of each party was, first, not to oppose the probate of the other's will; second, not to contest or oppose such will; and third, not to apply for letters of administration or letters of administration with the will annexed upon the estate of the other. Both parties agreed that by said contract they had settled, adjusted and forever determined 'all of their respective rights to, of and in any inheritance of the one from the other, respectively, or in or to the estate of either.' Reading the terms of the contract as thus limited, it took away from appellant all right or claim to any interest in the property of her husband either by virtue of her status as wife or widow or as heir of her husband. *But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift inter vivos, by devise, or by request.* As applied to such gift we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will. . . ." (Emphasis added.)

In *Grimm v. Grimm, supra,* the court had occasion to give more elaborate expression to the rule of the *Crane* case. The question there presented was whether the property settlement agreement negated the wife's right to take the proceeds from her husband's life insurance policy, in which she had been designated the beneficiary. In holding that the wife could take as a beneficiary, the court stated (pp. 176-177): "It is settled, however, that a contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides.

[Citation.] In interpreting property settlement agreements courts weigh carefully the language of the agreements before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements. [Citations.] This court and other courts have therefore applied to property settlement agreements the rule that *general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies* and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other. [Citations.] In *Estate of Crane, supra,* this court set forth the considerations that commend the rule that *expectancies under a will or an insurance policy are regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract.* Since the husband has the power to revoke his will or to change the beneficiary named in an insurance policy his failure to do so ordinarily indicates that he did not wish to effect a change so that in effect his failure to act amounts to a confirmation of the will or the designation of the wife in the insurance policy. Both instruments are to be read as expressing the decedent's intentions at the time of his death." (Emphasis added.)

In *Estate of Hadsell,* 120 Cal. App. 2d 270 [260 P. 2d 1021], the decedent willed all her property to her husband. After the execution of the will, decedent entered into a property settlement agreement with her husband which read in part: "It is agreed that neither party will at any time hereafter assert any right, title or interest as heir-at-law, or otherwise of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate, and all claims as such heir, or as surviving husband and wife respectively, and the right to contest or oppose the will of the other is hereby expressly waived, together with the right to administer, or to apply for Letters of Administration, or Letters Testamentary, upon the estate of the other. The parties also waive all rights of probate, homestead and family allowance." The parties were living apart when the wife died. Both the husband and decedent's brother applied for letters testamentary. The brother was appointed administrator with the will annexed and the husband appealed. In reversing, the court stated (p. 272): "Unless a property settlement agreement specifically renounces the right, such agreement does not estop a surviving husband or wife to take under the will of the other. And the will speaks from and as of the date of the testator's death. [Citation.] A property settlement agreement by a wife, relinquishing all right to any interest in her husband's estate, was not inconsistent with the husband's will, executed before the agreement, leaving his property to her. 'The relinquishment amounts to nothing more than leaving the dece-

dent free to dispose of his property as he pleases. . . .' [Citation.]"

It is to be borne in mind that decedent executed the will under which respondent is claiming on June 29, 1951, while negotiations for a property settlement were in progress. He had then available an alternate form of will under which respondent would take nothing. This form he never executed. After the property settlement agreement was signed, he did not revoke the testamentary disposition in respondent's favor.

Applying the above criteria to the instant case leads inevitably to the conclusion that the trial court correctly interpreted the instrument as not extinguishing respondent's right to take anything the testator might voluntarily leave her by will. The agreement is comprehensive as to the existing property rights of the parties, and plainly preserves to each complete freedom with respect to the disposition of the segregated property. The crucial paragraphs are 5(e), 6, 7, and 8, set out *supra*. Their ultimate effect is to eliminate the future obligations of the testator growing out of the conjugal relationship; but in no way do they inhibit his privilege of making reespondent an object of his testamentary bounty or abridge her eligibility to receive such gift. The contract does disclose, on the part of each, a relinquishment of the right (1) to act as personal representative of the other's estate; (2) to have set aside any of the other's property as community property or to declare a homestead thereon; (3) to demand a family allowance, and (4) to *succeed*

to the estate of the other. It specifically relates to a particular expectancy in paragraph 5(e), where respondent purports to surrender any right or claim as a beneficiary of decedent's insurance policies, which are individually listed in an appendix. But one searches in vain for any provision in which respondent agreed to forego any part of the estate that might come to her *by will.* In *Estate of McNutt,* 36 Cal. App. 2d 542, 549 [98 P. 2d 253], decided by this court, it was said: "If it had been the intention of the parties that plaintiff should waive her right to inherit from decedent, under such circumtances as those presented, 'the easiest and most natural thing in the world would have been for them to have simply, plainly and in apt language said so.' "

Appellant urges that particular language in paragraph 7, when construed with the other paragraphs alluded to, must necessarily exclude the respondent from inheriting by will. He focuses his emphasis on the clause appearing near the close of the paragraph, following the recitation of various express waivers, which reads "or any other right, benefit or emolument from the estate of the other" as the fulcrum for this argument. However, the tenor of the authorities we have previously cited, militates fatally against appellant's construction. For it is firmly established that general expressions or clauses are not to be construed as a relinquishment or divestment of an expectancy to take by will unless that is the clear and unmistakable import of the language employed. (*Grimm v. Grimm,* 26 Cal. 2d 173, and cases cited at

pages 176 and 177 [157 P. 2d 841].) As the *Grimm* case states in exposition of this rule, "expectancies under a will . . . are regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract." But there is nothing in the record to remotely suggest that respondent ever knew that decedent had included her in the testamentary scheme of his will, or that her attention was directed to such possibility. The agreement contains no express reference to such expectancy, and it does not show with any quantum of reasonable certitude that respondent was, by necessary implication, waiving her right to take by will. The general language relied on by appellant does not express such intent with the certainty the law requires for the renunciation of an expectancy. Furthermore, it may be observed that they are set in immediate juxtaposition with and colored by the waiver of family allowance in the preceding clause and the waiver of the right to select a homestead in the succeeding one, and are contained in the same paragraph where the right of succession to, as well as the right to act as personal representative of, the estate is waived. The agreement was prepared by able and experienced counsel presumably conversant with the law, and if it had been intended that respondent waive the right to inherit by will the insertion of a few simple words could have easily effected such result.[10] *(Estate*

[10]In *Sullivan v. Union Oil Co. of Calif.*, 16 Cal. 2d 229 [105 P. 2d 922], the agreement provided that the parties "release and waive all right to inherit under any will of the other." (P. 233.) This exact phrase is used in the agreement considered in *Meherin v. Meherin*, 99 Cal. App. 2d 596, 598 [222 P. 2d 305].

of McNutt, 36 Cal. App. 2d 542, 549 [98 P. 2d 253].) However, such words are here entirely absent, and we may not undertake, by indulging in precarious and dubious inferences, to support them and thus remake the contract of the parties. The observation of the court in *Estate of Crane, supra,* (p. 220) is here apposite that "as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift *inter vivos,* by devise, or by bequest." We are all the more restrained from interpolating such words because a scrutiny of the text of paragraph 8 reveals with what specificity of detail the desired releases of various rights is set forth. This paragraph, read in conjunction with paragraph 5(e), containing the waiver of rights under the insurance policies, points up how cognizant the draftsmen of the contract were of the necessity to embody therein the release of expectancies. It is noteworthy that the parties waived the right "to succeed to the estate of the other," i.e., to take by descent—by operation of law (*Estate of Schwartz,* 79 Cal. App. 2d 301, 307 [179 P. 2d 863]), yet significantly omitted any reference to an expectancy under a will. Taking into account the meticulously defined waiver of rights and releases of expectancies enumerated in the document, the situation presented renders peculiarly applicable the invocation of the maxim *expressio unius est exclusio alterius.* In *Estate of Minier,* 215 Cal. 31, the court stated in discussing a kindred problem (p. 35 [8 P. 2d 123, 81 A.L.R.689]): "It will be further observed that follow-

ing the general release clause in the separation agreement between Mr. and Mrs. Minier, is a provision that in case of divorce neither party will make any claim or demand from the other for any cost, counsel fees, or alimony, or any other property claim, or demand of any kind whatsoever. That the parties should so carefully and minutely provide against either party claiming any rights from the other in case of divorce proceedings being instituted and should omit any reference to any claim either should make against the property of the other in the case of the death of either, under the rule of *expressio unius est exclusio alterius* leads strongly to the inference that they did not intend by their agreement to relinquish or in any way affect their inheritable rights."

In the light of these circumstances, to hold that a contract by necessary implication was intended to nullify an antecedent will in the possession of, and subject to the absolute control of its maker, where the proper construction of its language does not so require, would be to incorporate therein a specific term which the parties have not included. To do so would constitute an unwarranted departure from the principles governing cases of this character. (*Grimm v. Grimm, supra; Estate of McNutt, supra; Estate of Minier, supra; Estate of Jones,* 118 Cal. 499, 502 [50 P. 766, 62 Am. St. Rep. 251].)

The principal cases relied on by appellant are clearly distinguishable, and reinforce the views here expressed. In *Sullivan v. Union Oil Co. of Calif.,* 16

Cal. 2d 229 [105 P. 2d 922], the husband had an interest in an "Employee's Provident Fund" maintained by his employer, to which he contributed by monthly deductions from his salary, and which provided for a benefit payable at death to the wife. This "Provident Fund" was *expressly mentioned* in a property settlement between husband and wife dividing up all their property. As pointed out in *Grimm v. Grimm, supra,* (p. 180) in distinguishing the case: "Under the facts of that case all interests of the wife in the fund were regarded as part of her interest in the community property and as such released [by the agreement] in favor of the husband." In *Meherin v. Meherin,* 99 Cal. App. 2d 596 [222 P. 2d 305], a husband and wife made a property settlement agreement in which the wife released to her husband her interest in a certain policy which was *specifically designated* in the instrument. It was therefore held her rights terminated even though the husband had not executed a formal change of beneficiary before his death. In *Thorp v. Randazzo,* 41 Cal. 2d 770 [264 P. 2d 38], the court was again confronted with a property settlement agreement in which a divorced wife (plaintiff) waived her claims in two named and numbered insurance policies on her husband's life. The deceased failed to remove plaintiff's name as beneficiary of one of the policies, although he did on the other. In rejecting plaintiff's claim to the proceeds of the policy, the Supreme Court reaffirmed the rules we have hitherto stated (see pp. 773-774). The court then said (p. 776): "Expectancies under a will or an insurance policy may be regarded

as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in their property settlement agreement. [Citations.] But in the present case *specific reference was made in the agreement to the insurance policy, and plaintiff expressly waived all claim to 'any benefits that she may have at present or which may hereafter be derived from' such policy.* This language clearly indicate that the parties' attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future." (Emphasis added.)

This is vitally different from the agreement here under consideration and lends support to our conclusion that plaintiff is not barred from taking under the will.

In view of this conclusion, it becomes readily apparent that there is no substance in the affirmative defense of waiver by agreement interposed to the petition for partial distribution. The further argument that respondent is estopped to deny the binding force of the agreement is of no moment since such agreement offers no obstacle to her right to take under decedent's will.[11]

There is likewise no merit in the claim of error in several rulings on the admission of evidence. To begin

[11]The claimed error committed by the trial court in allegedly failing to find on the question of estoppel is rendered immaterial. *(Logan v. Forster*, 114 Cal. App. 2d 587 [250 P. 2d 730].) Therefore the exclusion of certain evidence touching on the question of estopped is, of course, nonprejudicial.

with, the court did receive evidence, contrary to appellant's claim, of the length of the marriage, the fact that difficulties had arisen, and that respondent was advised by counsel in negotiating the property settlement agreement. The exclusion of other evidence relating to the purpose of respondent's trip to Nevada after the agreement was executed and her remarriage after her husband's death was not prejudicial. It could not affect the terms of the previously negotiated property settlement agreement and was not calculated to establish that her attention was directed to any possible expectancy and that she waived it. On this latter point, the court excluded no competent evidence.

Appellant also seeks review of the order vacating the setting of his petition to determine heirship, contending he was thereby denied a trial by jury to which he was entitled by section 1081 of the Probate Code. He also assigns as error the court's ruling in denying his motion to be relieved from waiver of a jury trial in the hearing of respondent's petition for partial distribution. In brief recapitulation of the events leading up to these rulings, respondent filed her petition for partial distribution on January 26, 1953. Appellant filed his answer thereto on February 13, 1953. By way of affirmative defense, appellant set up the property settlement agreement, alleging that thereby respondent was not entitled to take under the will and was estopped to disclaim the validity of the agreement by virtue of having allegedly accepted its benefits. This petition was first set for hearing on February 13, 1953, but was continued from time to time until March

10, 1953, when it was transferred with the other pending matters for determination by Judge Condee. The various matters were continued until the following day, when the parties entered into the stipulation concerning the mode of conducting the hearing and the application of the evidence to all of the pending matters. When the court thereafter concerned itself with the question of appellant's competency to act as executor, the other proceedings were continued until April 6th. On April 2, 1953, appellant filed his petition to determine heirship and prayed for jury trial. This was 65 days after service of citation on him of respondent's petition for partial distribution, 48 days after the matter was first set for trial, and about three weeks after the hearing had commenced and stipulations made as to the conduct of the proceedings.

We may pause here to point out that the petition for partial distribution and the answer thereto embraced all the issues involved in the heirship proceeding. A petition for partial distribution implements the policy of the law favoring the earliest possible delivery of inherited property to legatees or devisees consistent with a proper administration of the estate. (*Estate of Glenn,* 153 Cal. 77, 80 [94 P. 230]; *Estate of Morelli,* 102 Cal. App. 2d 39, 42 [226 P. 2d 716].) Diverse questions are often raised in such a proceeding in addition to the propriety of distribution, including that of disputed heirship. (*Estate of Painter,* 115 Cal. 635, 639-640 [47 P. 700]; *Estate of Hill,* 94 Cal. App. 113, 117 [270 P. 208].) As stated in *Estate of Hill:* "before the court can make an order for partial

distribution, it is necessary to know whether the petitioner is entitled to any part of the estate. *(Estate of Ross,* 187 Cal. 454, 466 [202 P. 641].)" To the same effect is *Estate of Stephenson,* 65 Cal. App. 2d 120, 124 [150 P. 2d 222].

In proceedings for partial distribution, either party has a right to demand a trial by jury of any issues of fact raised therein. *(Estate of Baird,* 173 Cal. 617, 623 [160 P. 1078]; *Estate of Perkins,* 21 Cal. 2d 561, 567 [134 P. 2d 231]. From the record, it is clear that appellant's former counsel waived any right to a trial by jury by failing to demand a jury "at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipuation . . . " (Code Civ. Proc., §631(4); *Estate of Henshaw,* 68 Cal. App. 2d 627, 638 [157 P. 2d 390]; *Glogau v. Hagan,* 107 Cal. App. 2d 313, 316-319 [237 P. 2d 329].) As late as March 11th, the record is clear that appellant was prepared to proceed without a jury and that this waiver of jury had been consciously and deliberately effected. The belated interjection of appellant's petition to determine heirship coupled with a demand for a jury trial (Prob. Code, §§1080-1081) did not compel a suspension of the proceedings and a trial of the matter by jury thereafter. *(Estate of Stephenson,* 65 Cal. App. 2d 120, 124 [150 P. 2d 222].) When the motion to vacate the setting of this petition was before Judge Hansen on May 14, 1953, the following situation prevailed: The partial distribution proceeding was set for further hearing four days later;

the petition to determine heirship, filed some two months after service of resepondent's petition for partial distribution, constituted a duplication of the issues already before the court in the distribution proceeding and a jury had been deliberately waived in the latter proceeding by appellant. We perceive no abuse of discretion on the part of Judge Hansen, in the light of these facts, in vacating the setting and ordering the petition "off calendar."

The denial of appellant's request for relief from the waiver of the jury trial was likewise proper. *(Estate of Stephenson, supra.)* The request for such relief was filed on May 14th and the order of denial was made upon the resumption of the hearing of the partial distribution and other proceedings on May 18th. *Estate of Stephenson, supra,* bears a striking parallel to the instant situation. In that case, the court refused to suspend its hearing of a petition for partial distribution despite the filing of a petition to determine heirship accompanied by a demand for a jury trial on the day set for hearing on the first petition. The court remarked in language here pertinent: "As above noted at the commencement of the hearing on respondent's petition no proceedings to determine heirship were pending. The filing of the heirship proceedings during the progress of the hearing did not compel the court to terminate the hearing and decide the issues then before the court at a later hearing on appellant's heirship petition. All of the interested parties were then before the court and the issues were clearly set forth. Appellant had had notice of the pendency of the

respondent's petition and was not prejudiced by the action of the court in proceeding therewith. Appellant's claim that she was prejudiced by being deprived of a jury trial is without merit. She made no demand for a jury trial in the matter heard by the court. Her only demand for a jury trial was made at the time she filed her own petition to determine heirship and, as we have seen, the court was justified in proceeding with the hearing on the issues on respondent's petition for partial distribution."

Furthermore, appellant was not prejudiced in this instant situation by proceding without a jury. The question here involved is one of law, viz., the interpretation of an unambiguous written property settlement agreement. As has been pointed out previously where, as here, there is no evidence to indicate that the attention of the respondent was directed to an expectancy under a will and no clear language appears in the settlement contract suggestive of an intention to disclaim such an expectancy, the agreement will not be construed as a renunciation of the right to take under the will. *(Crane v. Crane, supra; Grimm v. Grimm, supra; Thorp v. Randazzo, supra.)* In such case, it is the duty of the court to carry out the solemn directions contained in the will without detracting from the provisions therein made.

Appellant charges that he was denied due process on the theory that the trial judge's conduct was arbitrary and capricious. He therefore asserts that the entire proceedings herein were "null and void." He

bases this contention on the fact that on March 11, 1953, when the petition of Mrs. Morse for partial distribution, petitions for attorneys fees, and extraordinary fees, and the settlement of and objection to the accounts of the administrator and executor came on for hearing, the court, on its own motion, raised the question of the competency of appellant to act as executor, and two days later removed him from this office. This order was reversed because of the lack of prior notice of the specific charges against him and the failure to provide him an opportunity to present evidence in his defense. (*Estate of Buchman,* 123 Cal. App. 2d 546 [247 P. 2d 73].) In holding appellant was denied due process of law (p. 561) in this removal proceeding the court pointed out that the Judge's conception of his duty was erroneous (p. 560). On April 6, 1953, the date to which the matters here under review were continued, appellant, through new counsel, filed objections to Judge Condee's hearing the petition for partial distribution or on any other matter in the Buchman Estate on the ground that Judge Condee "is biased and prejudiced" against him. Appellant supported his objections by his own affidavit in accordance with section 170, Code of Civil Procedure. Judge Condee thereupon continued the various matters, including the petition for partial distribution, to May 18, 1953. In the meantime Judge Condee filed his controverting affidavit and answer in response to the motion to disqualify. The matter was referred to the Honorable Philip H. Richards, Presiding Judge of the Superior Court of Los Angeles County, to pass upon. On April 23d he found

that Judge Condee was not disqualified. Notwithstanding Judge Richards' decision, appellant asserts that the reversal of the order removing him as executor of the estate necessarily meant that Judge Condee was in fact biased and prejudiced and that on review of "the judgment of the balance of the proceedings of this consolidated trial, it must necessarily follow that the entire proceedings were fatally infected with the denial of due process" which nullified all subsequent orders. In making this argument appellant misconceives his legal position in three particulars. The first relates to the decision of the District Court of Appeal in the removal proceeding *(Estate of Buchman, supra.)* The basis of the reversal of the order removing Buchman as executor was the failure to give him prior notice of the asserted grounds therefor and an opportunity to present evidence in relation thereto. This, of course, was a denial of due process but it was not a determination that Judge Condee was guilty of bias and prejudice. As the court pointed out (p. 660), the judge's conception of his duty was simply erroneous. However, an erroneous opinion on the law relating to proceedings is not "any evidence of bias or prejudice." *(Ryan v. Welte,* 87 Cal. App. 2d 888, 893 [198 P. 2d 351].) Likewise, "the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice." *(Kreling v. Superior Court,* 25 Cal. 2d 305, 310-311 [153 P. 2d 734].) Appellant's second misconception relates to the effect of Judge Richards' decision on appellant's charge of bias and prejudice

against him. The burden in such proceedings was on appelant to establish as a fact that Judge Condee was biased or prejudiced against him. (*Golish v. Feinstein,* 123 Cal. App. 547, 549 [11 P. 2d 893]; *Ryan v. Welte, supra.*) On conflicting evidence Judge Richards found that appellant's charges were not true. A finding and order based on such evidence is, of course, binding on appeal. (*Barry v. Contractors State License Board,* 85 Cal. App. 2d 600, 608 [193 P. 2d 979]; *Ryan v. Welte, supra,* p. 891.) This provides a complete answer to appellant's further point that "the trial court erred in failing to grant a change of venue in this case to some other judge." Since the matters were regularly before a judge who was not disqualified there was no legal reason for a transfer to another court. Appellant's third misconception relates to the state of the record. It is his position that all matters before the probate court in the Buchman Estate were consolidated. From this he argues that the lack of due process inherent in the removal proceeding permeated the entire matter, vitiated all orders thereafter made, and rendered them null and void. The fact is, the several matters before the probate court were not consolidated except for convenience of trial of related issues. On March 11, 1953, counsel for the parties stipulated, with the court's approval, "that these [matters] may all be tried together, and that evidence competent in any of these matters may be received, and at the end the court will sort it out and make a separate ruling in each matter." No order of consolidation was made. As indicated by

the stipulation, a single order or judgment was not contemplated as is true where there is actual consolidation. (See *McClure v. Donovan,* 33 Cal. 2d 717, 721-722 [205 P. 2d 17].)

It is thus clear that while all of the matters were related, since they all pertained to some phase of the Buchman Estate, they were each to be decided individually and separately based upon the evidence relevant to the particular item. Hence the failure to observe procedural due process in the removal proceedings of March 11 and 13 could not possibly serve to render invalid orders thereafter made relative to partial distribution, settlement of accounts or allowance of fees.

In this connection appellant makes the further contention that "having appointed a special administrator, the court was without power to make a partial distribution." In making this contention appellant fails to appreciate that the special administrator was appointed "with general powers" pursuant to section 465, Probate Code.[12] As said in *Levy v. Cytron,* 84 Cal. App. 2d 827, 829 [191 P. 2d 816]: "The plain language of the . . . section leaves no room for construction. Its obvious purpose is to provide a general administration of the estate during the delay and uncertainty attendant upon a will contest or litigation over the appointment, suspension or removal of an

[12]The pertinent portion of section 465 reads:
"When a special administrator is appointed . . . pending an appeal from an order appointing, suspending or removing an executor or administrator, the special administrator shall have the same powers, duties and obligations as a general administrator and the letters of administration issued to him shall recite that such special administrator is appointed with the powers of a general administrator . . ."

executor or administrator. The order granting the special administratrix the additional powers authorized under section 465 of the Probate Code in effect made her letters general rather than special. [Citation.] Having all the powers of a general administratrix, she had the power to sell property of the estate."

Since general administration is provided for by such an appointment, the probate court clearly had jurisdiction to determine a previously filed petition for partial distribution. The cases relied on by appellant are not helpful since they did not involve special administrators with general powers appointed pending an appeal from an order removing an executor. Indeed, it is pointed out in *Estate of Davis,* 175 Cal. 198 [165 P. 525] (on which appellant relies), in explaining the holding *In re Welch,* 106 Cal. 427 [39 P. 805] (on which appellant also relies) that: ". . . the court had no authority, while there was a special administrator in charge of the estate *and during the time when the general administration was suspended,* to make a partial distribution." (Emphasis added.) Thus the deficiency pointed out in the *Welch* case, viz., the absence of general administration, was supplied in the instant matter by clothing the special administrator with general powers pursuant to the authority of Probate Code, section 465.

These conclusions effectively dispose of appellant's next contention that 'the notice of appeal from a consolidated trial, in which part is reviewable on appeal, removes the jurisdiction of the superior

court and the trial judge should have therefore stayed all of the proceedings until after the decision on appeal." This proposition is not here applicable because, as above pointed out, the several matters were to be separately and individually decided on the evidence relevant to each. Hence an appeal from the removal order could not possibly serve to deprive the superior court of jurisdiction to consider the petition for partial distribution while the appeal from the former order was pending. (Code Civ. Proc., §946; 3 Cal. Jur. 2d 682, §193. See also *Estate of Thayer,* 1 Cal. App. 104, 106 [81 P. 658].) Appellant's error lies in his mistaken belief that all the proceedings before the probate court were truly consolidated. As disclosed by the record, such is not the fact. Hence his asserted proposition is wholly without any appropriate factual foundation. Appellant relies on *Evans v. Superior Court,* 107 Cal. App. 372 [290 P. 662]. Examination of that case, however, discloses that it does not support his proposition.

Appellant argues that the court erred in ordering partial distribution to petitioner on the ground that "The Estate was not in such a shape as to permit the partial distribution at the time." Section 1001 of the Probate Code authorizes the court to order partial distribution if it appears that the estate "is but little indebted"; that the state has consented thereto in writing; and that the distribution may be made "without loss to the creditors or injury to the estate or any person interested therein." The section further provides that when the time for presenting claims has

expired and "all uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond." Whether an estate "is but little indebted" or partial distribution can be made "without loss to the creditors or injury to the estate or any person interested therein" are questions of fact to be determined by the trial court upon a comparison of the value of the estate with the amount of debts, the character of the property, the expense of its maintenance and operation where it is a part of a business venture, the extent of the net income therefrom and all other relevant factors. (*Estate of Chesney,* 1 Cal. App. 30, 34 [81 P. 679]; *Estate of Hinkel,* 176 Cal. 563, 567 [169 P. 70]; *Estate of Morelli,* 102 Cal. App. 2d 39, 42 [226 P. 2d 716].) In the instant matter, the findings disclose that the estate had some $60,000 in cash at the date of the accounting; the value of the estate at that time was approximately half a million dollars; that the two parcels of improved real property were encumbered only to about 40 per cent and 25 per cent, respectively, of their value, and that the net income therefrom to the estate was some $3,000 per month; and further, that the unsecured debts and expenses of administration would not exceed $25,000. Appellant does not contend that the evidence does not support these findings. It is also to be noted that the time for filing creditors' claims had long passed and the State of California had consented to the distribution. In light of these facts it cannot be

said, as a matter of law, that the trial court abused its discretion in ordering $24,000 distributed to respondent out of an estate of this magnitude, which was yielding a substantial monthly net income and was relatively little encumbered.

Appellant further complains that no bond was required of respondent. However, the time for filing claims had passed. There was ample security left in the estate. In discussing the necessity of a bond in such circumstances it was pointed out in the *Morelli* case, *supra* (p. 42), that "The court must require a bond if the time for presentation of claims has not expired, but after that time it may dispense with the bond if there is sufficienet security left in the estate." The facts herein recited justify the implied finding that "no injury" could result "to the estate" by dispensing with the bond. (Prob. Code, §1001.) On this point we may say, as did the court in *Estate of Johnson*, 218 Cal. 501 [23 P. 2d 1012], that "The question of a bond on partial distribution, under the facts here, was one of discretion and we see no showing of an abuse thereof." (P. 504.)

As his final contention, appellant assigns as error the court's disposition of three items in connection with the settlement of accounts: (1) He complains of the order requiring him to reimburse the estate forthwith in the amount of $6,000 despite the fact that his fees as executor would exceed this amount. This determination was correct. It was conceded that appel-

lant owed this amount to decedent.[13] The order properly treated this indebtedness as cash in the hands of the executor for which appellant was chargeable in his accounting. (Prob. Code, §602; *Estate of King,* 19 Cal. 2d 354, 361 [121 P. 2d 716]; *Manifee v. Rowley,* 187 Cal. 481, 486 [202 P. 673]; *Estate of Clary,* 203 Cal. 335 [264 P. 242]; *Estate of Jones,* 115 Cal. App. 664, 669 [2 P. 2d 483].) The record also shows that appellant was properly surcharged in the sum of $665. This sum was listed as a disbursement for a tombstone for decedent's father, which decedent had contracted to pay. However, the item appeared twice as a credit, apparently by mistake,[14] and the court adjusted the matter to avoid duplication. (3) The last item relates to the sum of $2,515, which appellant paid to a Chicago mortician as the cost of decedent's funeral. The record shows that there was no question as to the reasonableness of the amount, and that appellant testified he had paid the money therefor out of his personal assets. The

---

[13]The transcript shows the following:

"MR. DEVOR: . . . there is no doubt he is indebted to the estate for $6,000.

"THE COURT: Yes, he would have to ask for instructions or otherwise if he claims it against the estate, and a debt of the executor or administrator becomes cash in his hands.

"You concede that is true?

"MR. LAVINE: Yes, your honor, I concede that. There is no question about that. We have some matters in connection with which we will take up with the special administrator, however.

"THE COURT: Yes. Well, it wouldn't preclude you later on showing the facts, whatever they are."

[14]The record discloses this colloquy:

"THE COURT: Well, then when you see it appearing in the corporation too it is probably a duplication, isn't it?

"MR. LAVINE: We are not asking for duplication, your Honor. The executor only wants it once, your Honor.

"THE COURT: Then that would be a $625 [sic] surcharge, on the double. Are you satisfied with that, Mr. Devor?

"MR. DEVOR: Yes, your Honor, we will allow him to have it once, but not twice.

"MR. LAVINE: We are agreeable. It was an error in bookkeeping there."

transcript shows that the court stated: "The funeral expenses will be allowed." In its formal findings, the court found to be true paragraph XIII of appellant's first and final account and report and first account current and report, which alleges, in part, that appellant advanced $2,515 in personal funds to Furth and Coe, of Chicago, for the funeral expenses of the decedent. The order shows that the above named accounts were settled and allowed as rendered, except with respect to the surcharge of $6,000 and $665 which have been heretofore discussed. This indicated that the court did not disallow the sum of $2,515 for funeral expenses, but considered appellant to be entitled to credit therefor as prayed. Apparently by inadvertence, this item was not specifically included in the order. The order should accordingly be modified to credit appellant's account with this sum.

The order decreeing partial distribution is affirmed. The order settling accounts is modified to include the following: "Hamlin K. Buchman is hereby authorized to credit himself for funeral expenses disbursed by him personally the sum of $2,515.00" and, as so modified, the order is affirmed. The costs on appeal are apportioned as follows: Appellant 90 per cent and respondent Claire Morse 10 per cent.

Moore, P. J., and McComb, J., concurred.